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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 206

CONTINENTAL OIL COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion delivered orally by the District Court on October 11, 1967 (App. A, *infra,* pp. 1a-8a), is unreported. The District Court's decision, dated November 17, 1967 (App. B, *infra,* pp. 9a-10a), is reported at CCH, 1967 Trade Cases ¶ 72,292. That decision incorporated by reference: (1) the District Court's prior decision rendered on September 7, 1965 (App. C, *infra,* pp. 11a-25a), which is reported at CCH, 1965 Trade Cases ¶ 71,557; and (2) all of the parties' stipulations as to facts (1st, 2nd, 3rd and 4th Stips. of Facts; 1st, 2nd and 3rd Stips. as to Certain Documents).[1]

[1] "Instead of making any further detailed findings and conclusions, the Court does hereby adopt the findings and conclusions previously made insofar as they are not in conflict herewith and as they are modified by this decision . . . The Court does adopt all of the stipulations of the parties as facts in this case, in addition to those which the Court has found" (*infra,* p. 10a).

JURISDICTION

This suit by the United States was brought pursuant to Section 15 of the Clayton Act, 38 Stat. 736, as amended by 62 Stat. 909, 15 U.S.C. § 25, alleging that an acquisition made by the defendant, Continental Oil Company, was in violation of Sec. 7 of the Clayton Act, 38 Stat. 731, as amended by 64 Stat. 1125, 15 U.S.C. § 18.

The judgment of the District Court (App. D, *infra*, pp. 26a-30a) was entered on February 21, 1968. Continental Oil Company filed its notice of appeal on April 3, 1968. The time for docketing the appeal was extended by order of Mr. Justice White to June 20, 1968.

The jurisdiction of this Court is conferred by § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304 *et seq.*

QUESTIONS PRESENTED

The ultimate question to be determined is whether the acquisition by Continental Oil Company from Malco Refineries, Inc., of a single manufacturing facility (a crude oil refinery at Artesia, New Mexico) violated Section 7 of the Clayton Act. Subsidiary to such ultimate question are the following:

1. Whether the acquisition here in suit was justified and lawful because of the presence of "mitigating factors," *Brown Shoe Co.* v. *United States*, 370 U.S. 294 at 319, 346, which the court below erroneously refused to consider because it construed *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277, as having overruled *Brown Shoe*.

2. Whether the unopposed and admittedly bona fide complete divestiture prior to trial of the entire marketing

operation, which had been part of the original transaction in controversy, eliminated and rendered moot all issues arising out of the acquisition of that marketing operation.

3. Since the only asset acquired and retained by the defendant is a manufacturing plant (a refinery) which sells a fungible product (gasoline) *in bulk* to other manufacturers and independent marketers, whether it is proper to treat as part of the defendant's "share" of the *retail market* the resales made by those other manufacturers and independent marketers through their own distribution channels and under their own brand names.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18, provides in pertinent part:

> ". . . no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT OF THE CASE

On May 1, 1959, Continental Oil Company ("Continental") acquired the following assets from Malco Refineries, Inc. ("Malco"): (a) a relatively small petroleum refinery at Artesia, N. M.; (b) a pipeline gathering system that supplied the refinery with crude oil; and (c) a marketing operation that disposed of the refinery's finished products (GX 49, 50). On May 16, 1961, the United States ("Government") filed this suit alleging that the acquisition violated Section 7 of the Clayton Act. Subsequent events greatly simplified the issues:

The crude oil pipeline phase of the acquisition was eliminated by the Government's withdrawal of all issues with respect to crude oil as a separate "line of commerce" (Stip. Narrowing Issues; Pre-Trial Order ¶¶ 17, 18 (c). The parties further agreed that the single "line of commerce" involved herein is gasoline (7/10/63 Pre-Trial Tr. pp. 9, 14, 24; Pre-Trial Order ¶ 18 (f)).

The marketing phase of the acquisition was eliminated on July 1, 1965, when Continental, after notice to the Government, completely divested itself of the entire Malco marketing operation, including all retail outlets, customer accounts, goodwill, brand names, trademarks, etc. (CONX 152, 153; Pre-Trial Order ¶¶ 21, 22, 24).

Thus, the only part of the acquisition remaining in controversy consists of the manufacturing facilities; to wit, the former Malco refinery.

A. Prior Proceedings

This case is now here for the third time; but on neither of the prior appeals did this Court hear, consider or determine the merits of the controversy. Continental has yet to have its day in this Court.

Continental was twice victorious in the court below. In September 1963, the late District Judge Waldo H. Rogers granted Continental's motion for summary judgment. In May 1964 this Court vacated such judgment on the authority of *Poller* v. *Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, and remanded the cause "for a trial on the merits of the case." *United States* v. *Continental Oil Co.*, 377 U.S. 161.

The trial on the merits was held, as directed, before District Judge H. Vearle Payne (Judge Rogers having meanwhile died) during July 1965. On September 7, 1965, Judge Payne rendered his decision (*infra*, pp. 11a-25a), concluding "that the United States has failed to prove the material

allegations of its complaint and that the complaint should be dismissed." Judgment was entered accordingly on September 20, 1965; but it was vacated by this Court — again without a hearing — and the action was once more remanded, this time "for further consideration in light of *United States* v. *Pabst Brewing Co.*, 384 U.S. 546." *United States* v. *Continental Oil Co.*, 387 U.S. 424.

Continental conceded thereafter that, in line with the holding in *Pabst*, the State of New Mexico alone should be viewed as the "section of the country" applicable to this case.

Both parties moved for judgment on the record, without offering any additional evidence. In disposing of these motions, Judge Payne ruled as follows:

1 A sentence in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277, overruled, in effect, the doctrine of *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319, 329, 346, with respect to "mitigating factors" and renders all evidence of such factors "immaterial" (*infra*, p. 3a).

2. Continental's complete divestiture of the Malco marketing operation made no difference, because " a substantial joinder of companies that have or have had this market . . . is inherently bad" (*infra*, p. 4a).

3. The second remand of this case was tantamount to a direction by this Court to enter judgment in favor of the Government, (*infra*, pp. 1a-2a, 5a, 9a-10a).

Judge Payne nevertheless adhered to all findings of fact he had made in his 1965 decision (insofar as they did not conflict with, or were not modified by, his 1967 decision) and also adopted as facts in the case all of the facts stipulated to by the parties (*infra*, pp. 5a, 7a-8a, 10a).

The judgment now here on appeal was entered February 21, 1968 (*infra*, pp. 26a-30a).

B. The Uncontroverted Facts

Most of the essential facts in this case were agreed to in four Stipulations of Fact, or were proved by contemporaneous writings authenticated by three Stipulations as to Documents. Further undisputed facts were testified to by witnesses at the 10-day trial. The District Judge heard all of the evidence presented by both sides (*infra*, p. 13a), and, based thereon, made extensive findings of fact in his 1965 decision. No additional evidence has since been adduced.

1. Continental and its moribund New Mexico refinery

In 1959 Continental ranked 12th among all domestic oil companies in terms of net assets and sales of refined products (3rd Stip. of Facts ¶ 3), but 20th in operable refining capacity (CONX 157).

Continental's principal source of supply for the New Mexico market was a very small (4,000 barrels daily capacity) refinery at Artesia, N.M. It ranked 14th among the 19 principal refineries supplying New Mexico with gasoline (1st Stip. of Facts, ¶ 2(a), as amended); yet its output furnished 80% of Continental's total product requirements in the State (GX 21, 31, 36).

As early as 1955, a study indicated that this little plant was so old and inadequate that it could not be profitably operated beyond 1960 (GX 4). By 1959 it was on the verge of being shut down and abandoned because of obsolescence (Tr. 688-690, 699-701, 703-704). The possibility of modernizing and enlarging this plant was studied, but could not be justified economically (Tr. 586-587, 678). Accordingly, Continental gave serious consideration to the alternative of withdrawing completely from the New Mexico market (Tr. 579, 588, 617, 700, 704, 710, 712, 713-714).

2. Malco's refinery operation — a failing enterprise

Malco was a closely held corporation, used by Mr. Robert O. Anderson and members of his family to engage in the oil business. After 1957, the refining end of the business consisted of one 11,500 barrel-a-day plant at Artesia, N.M. (2nd Stip. of Facts ¶ 2). When Continental acquired that plant, it ranked 11th among the 19 principal refineries supplying the New Mexico gasoline market (1st Stip. of Facts ¶ 2(a), as amended).

For a while, the Malco refining operation was successful; but in the mid-1950's Malco began losing substantial volumes of business (Tr. 771; CONX 82, pp. 4). Its losses were particularly heavy in New Mexico, where sales of gasoline to jobbers, distributors and consumers declined more than 50% in only four years, dropping from 47.6 million gallons in 1955 to 23.4 million in 1958 (2nd Stip. of Facts ¶ 4; 1st Stip. of Facts ¶ 10).

There were two principal causes for Malco's loss of so much of its most profitable business: first of all, several new pipelines were constructed after 1954, thereby enabling many large refineries in West Texas and Southern California to lay down gasoline in the market centers of Albuquerque, El Paso, Tucson and Phoenix at far cheaper cost than the tank-truck freight charges Malco had to absorb (1st Stip. of Facts ¶ 3(a); Tr. 794-795; CONX 81; CONX 82, p. 4).[2]

The second cause of the decline in Malco's sales was an invasion of the area by several strong new competitors, some of whom sought and obtained independent jobber

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[2] Continental, of course, was also adversely affected; indeed, neither Malco nor Continental, with isolated refineries at Artesia — hundreds of miles away from the only metropolitan markets in the area — could continue to compete successfully after much bigger refineries gained cheap pipeline access to those markets (Tr. 578-579, 672, 678, 702-703, 709, 714-717, 741-742).

accounts in direct competition with Malco (Tr. 794-795; CONX 82, p. 4).

The decline in Malco's sales volumes, together with chaotic market conditions, practically wiped out Malco's profits (Tr. 781-782; CONX 82, pp. 3-4). Its pre-tax net income from refinery operations fell from $1,573,936 in 1957 to only $71,737 in 1958 (1st Stip. of Facts ¶ 20). This sharp decrease in profitability occurred, moreover, despite investments totaling some $2.5 million for purposes of modernizing the Malco Refinery and, hopefully, keeping it competitive (Tr. 766, 792-793; CONX 82, p. 3). As Mr. Anderson testified: "We actually put into the plant as much or more than we generated"; by 1958 the refinery operation had become "marginal"; "We were really spinning our wheels" (Tr. 763, 766-767, 793; CONX 82, p. 3).[3]

Confronted by the prospect that the Malco refinery operation would fail, Mr. Anderson began early in 1958 to explore every avenue for disposing of his company's Artesia plant (Tr. 762, 778-779). He approached six major oil companies, including Continental, with a view to selling out (Tr. 788-789).[4] He felt that Continental would be particularly interested because he knew that it was encountering considerable difficulty in operating its little, antiquated refinery also located at Artesia (Tr. 763).

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[3] Malco investigated the possibility of enhancing its ability to compete by building its own pipeline to El Paso and connecting it there with the lines running north to Albuquerque and west to Tucson and Phoenix (GX 3). But Mr. Anderson decided that the risk was too great; he was unwilling to make a pipeline investment of at least $2 million in an attempt to maintain his company's waning competitive position (Tr. 697-680, 770-773, 783).

[4] The other companies approached were Humble Oil & Refining Company, Union Oil Company of California, Sinclair Oil Corporation, Standard Oil Company of Indiana and Gulf Oil Corporation.

3. Combination of the Artesia refineries; investments and arrangements to keep them operating; disastrous financial results

Mr. Anderson's effort to interest Continental in acquiring the Malco refinery entailed protracted negotiations and deliberations for more than a year (Tr. 656-721). Continental twice flatly rejected the proposal (Tr. 663-665, 692-693), but finally concluded that there was one feasible solution to the difficult problems at hand: to combine and improve the Malco and Continental plants at Artesia and thereby create a modern 15,500 barrel-a-day refinery, big enough to realize economies of scale and to justify laying a 154-mile products pipeline to El Paso, where connections with existing lines would provide economical transportation to the area's other metropolitan centers (Tr. 579-580).

Success of this plan depended on Continental's ability to retain the patronage of most of Malco's customers (Tr. 583, 684). To be economical, the combined refineries at Artesia and the new products pipeline to El Paso would both have to operate at or near capacity (Tr. 596, 597). Continental's own product requirements in the area could absorb only about one-third of the enlarged refinery's output (Tr. 687, 697). Hence the necessity for retaining the business of Malco's customers, who consisted chiefly of independent jobbers and distributors having no contractual ties with Malco, and who were therefore free to switch at will to some other supplier (Tr. 608, 631, 692, 1004).

In order to keep the patronage of these Malco jobber-distributors, Continental formed a subsidiary (Malco Products, Inc., Delaware) and staffed it with the entire former Malco sales force, with instructions to continue to supply the Malco customers exactly as they had been supplied before (Tr. 583-584, 591, 598, 600-601, 709). These instruc-

tions were carried out (Tr. 591-592, 721-723, 790, 900). As a result, the Malco jobbers and distributors continued to compete in the market place just as vigorously as they had in the past; after the acquisition, both the number of Malco retail outlets and the volume of gasoline they dispensed increased significantly (1st Stip. of Facts ¶¶ 10, 11, 17).[5]

By combining and improving the Artesia refineries, laying the products pipeline to El Paso, and constructing pipeline terminals at El Paso, Albuquerque, Tucson and Phoenix, Continental preserved both of the Artesia plants as competitive sources of supply in the area. To accomplish this necessitated capital outlays by Continental of almost $6 million (1st Stip. of Facts ¶ 21).

Despite those heavy investments, however, the "Malco" operation sustained net *losses* of $836,000 in 1960 and $761,000 in 1961, or a total of almost $1.6 million for those two years (1st Stip. of Facts ¶ 23).[6]

4. Gasoline supplies for the New Mexico market

At the time of the acquisition in suit, total refining capacity being operated inside New Mexico amounted to less than 29,000 barrels per day; but gasoline was being supplied to the State by at least 19 refineries whose aggregate operating capacity exceeded 300,000 barrels daily

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[5] By contrast, the number of "Conoco" branded outlets and the volume of gasoline they retailed both decreased (1st Stip. of Facts ¶¶ 12, 16, 17).

[6] While Continental was able to withstand this sizeable loss, it seems doubtful, to say the least, whether Mr. Anderson would have kept the Malco refinery running if he had not leased it to Continental and thereby avoided the ensuing financial disaster.

(1st Stip. of Fact ¶ 2 (a), as amended). The 11,500 B/D Malco refinery represented about 3.8% of the total; and Continental's 4,000 B/D plant represented only 1.3% (*Id.*). But even these relatively small percentages (5.1%, combined) magnify the importance of the acquisition in suit, because — unless the two Artesia refineries had been consolidated — the Continental plant would have been shut down and junked within the next two years.

Furthermore, in addition to the 300,000 B/D of operating refinery capacity supplying gasoline to New Mexico, approximately 46,000 B/D of operable refining capacity was not even being used — about 4,000 B/D of such standby capacity being located inside New Mexico and a further 42,000 B/D lying just across the border in West Texas CONX 161, 162).

After the acquisition in suit, additional refining capacity, both inside and outside of New Mexico, began supplying the State with gasoline (1st Stip. of Facts ¶ 2(d)).

Most of the major units in the vast West Texas refining complex imported gasoline into New Mexico via pipeline (1st Stip. of Facts ¶¶ 3(a), 4(a), 4(b) as amended: CONX 82, CONX 159).[7] Additional large volumes of gasoline were

[7] The refineries referred to are as follows:

Refinery	Location (West Texas)	1/1/59 Op. Capacity (barrels per day)
El Paso Nat. G. P.	Odessa	13,500
Phillips	Borger	71,000
Shamrock	Sheerin	21,000
Standard of Texas	El Paso	50,400
Texaco	Amarillo	19,000
Texaeo	El Paso	16,000
		190,900

shipped into New Mexico by truck or rail.[8]

In 1959, the pipelines feeding into New Mexico had an aggregate daily capacity of 21,800 barrels, which equaled 80% of the total gasoline consumption in the State (Tr. 1590, 1617-1618). Such pipeline capacity could, if required, be readily enlarged (Tr. 1614-1618).

Out-of-state refineries played an increasingly important role in supplying the gasoline needs of New Mexico. In 1958 (the year before the acquisition in suit), over 285 million gallons of gasoline were imported, equivalent to more than 75% of the gasoline consumed there during that year (1st Stip. of Facts ¶¶ 1, 4(a)). By 1961, the imports had mounted to over 374 million gallons, which exceeded 90% of the year's New Mexico gasoline consumption *(Id.)*.

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[8] To the extent that origins of such shipments could be identified, their sources included all six of the refineries listed above in footnote 7, plus the following:

Refinery	Location	1/1/59 Op. Capacity (barrels per day)
American Petrofina	Wichita Falls, Tex.	10,000
Ben Franklin	Ardmore, Okla.	12,000
Col-Tex	Big Spring, Tex.	12,000
Continental	Denver, Colo.	13,600
Cosden	Colorado City, Tex.	30,000
Oriental	Alamosa, Colo.	900
Petroleum Ref.	Leuders, Tex.	2,000
		80,500

5. Complete divestiture of the "Malco" marketing operation

Early in June 1965, in an effort to settle this protracted and costly litigation, Continental offered to divest itself of all the marketing assets and business it had acquired from Malco in 1959, and to assure the purchaser of such assets of adequate supplies of petroleum products under a long-term contract. After consideration, the Government rejected this settlement proposal (Tr. 16-18).

Nevertheless, prior to the trial, Continental proceeded with the divestiture (CONX 152-155). Advance notice thereof was given to the Government, which interposed no objection to consummation of the divestiture and later conceded that it was a bona fide transaction (Tr. 15; Pre-Trial Order, ¶¶ 21-24).

Effective July 1, 1965, Continental sold and divested itself of all the marketing assets, business, goodwill, brand names and trademarks which had been acquired from Malco in 1959 (CONX 152, 153). The purchaser was a New Mexico corporation, all of whose stock was owned by Mr. C. A. Copple and his sons. Continental retained neither any financial interest in it nor any power of control over it.[9] At the same time, Continental entered into a Product Supply Contract with the Copples' company, the effect of which was to give the latter a call on the Artesia refinery

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[9] The asset sale agreement specifically provided that its intent and purpose was that the purchaser ("New Malco") would carry on the Malco marketing operation "entirely apart from Continental and without Continental's having any ownership interest in, or power of control over, New Malco or its business activities, policies or practices" (CONX 152; Pre-Trial Order ¶ 24).

(or any other source of supply Continental might have in the area) for petroleum products, including gasoline, for the next ten years (CONX 154, 155). In order to assure the Copples' company of adequate product supplies, Continental undertook to furnish each year up to 103% of the volume of each respective product purchased by the Copples' company during the preceding year. But the contract imposed no obligation whatever to buy products from Continental; on the contrary, the Copples' company was left entirely free to obtain products from any other source.[10]

C. The District Court's Findings of Fact

Based on the uncontroverted record proof outlined above, and without requesting or receiving suggested findings from either side, Judge Payne made the following, among other findings of fact:

As to mitigating factors

"Malco Refineries Incorporated was a marginal operation which was casting about to find a purchaser . . . the Continental refinery had a life expectancy of only about two years and, . . . Continental felt that the only practical solution was to combine the two refineries" (*infra*, p. 25a).

"The Court heard the witnesses testify concerning the purpose of the acquisition as well as concerning the manner in which the new refinery was used by Continental after the acquisition . . . Continental did not acquire the property for the purpose of strengthening its position in its standard branded gasolines, nor did it use the property acquired for that purpose" (*infra*, pp. 21a-22a).

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[10] The contract specifically provided: ". . . nothing herein contained shall be deemed to prevent or limit Malco's right to purchase petroleum products . . . from any supplier of petroleum products other than Continental."

". . . the intent of Continental in acquiring the property in question was not to stifle competition . . . Continental did not acquire . . . for the purpose of increasing its sales or influence as a major company . . ." (*infra*, p. 25a).

"Malco Products, Inc., a Delaware corporation, was operated by Conoco exactly as it or its predecessor had been operated before the acquisition. It was an active competitor on the market and operated just as it did before . . ." (*infra*, p. 17a; to same effect, *infra*, pp. 21a, 22a, 25a).

As to Continental's divestiture of the Malco marketing operations

"Furthermore, prior to trial, Continental transferred to a Mr. Copp'e and his sons the entire stock, ownership, possession and control of the distribution portion of the acquisition. There were no conditions nor ties of any kind so that the distribution portion of the business acquired is no longer under the control of Continental. In that connection, Continental has agreed to furnish the gasoline supply to Malco, now owned by the Copples, for a period of years. This agreement is such that it cannot be cancelled by Continental. Malco is left free to purchase gasoline anywhere it may desire. There is, however, a provision that Continental will furnish only the amount of gasoline purchased in each previous year plus 3% . . . This contingency . . . does not take away the independence of Malco in any degree" (*infra*, p. 22a).

As to gasoline supplies for the New Mexico market

". . . the production of the two refineries in question, even if combined, is not the ultimate test in determining whether or not competition is lessened . . . The Court cannot look to the production alone in New Mexico and shut its eyes to the importation of gasoline from other areas in determining the effect of the acquisition . . ." (*infra*, p. 18a; to similar effect, p. 19a).

"In addition . . . there is a practice of exchanging gasoline between companies which affects enormous supplies of gasoline . . . The testimony indicated that this system is used widely in the industry. In other words, the source of supply is often enlarged to wide areas by the exchange of products. This enlarges the number of suppliers and minimizes or eliminates concentration or control by a few.

"In order to determine the effect on competition it is necessary then to determine what the supply of gasoline may be for the relevant market area. This cannot be determined by the refineries in New Mexico alone but must be determined from a practical standpoint, considering any refineries which may, in the usual course of business, supply the area" (*infra*, pp. 19a-20a).

After describing in detail the several refineries which supplied gasoline to New Mexico and the pipelines through which such supplies were transported to market (*infra*, pp. 20a-21a), Judge Payne went on to find:

"There was no evidence to show that the existing pipe lines were running to capacity. The Court finds that if they were they could easily and cheaply enlarge their capacity to meet greater and further demands on the supply" (*infra*, p. 21a).

"The amount of gasoline being imported into the relevant market area seems more than adequate to provide a source of supply for any company desiring to purchase" (*infra*, p. 22a).

In his second (1967) decision herein, Judge Payne neither withdrew nor modified any of the findings above quoted. On the contrary, he adopted and reaffirmed them all (*infra*, p. 10a).

THE QUESTIONS ARE SUBSTANTIAL

A. Here at stake is the "mitigating factors" doctrine approved by this Court only six years ago in the Brown Shoe case

In its present posture, the case at bar holds, in effect, that when a corporation's manufacturing plant wears out, it may not legally be replaced by acquiring an existing plant which is up for sale; that the corporation's only lawful alternatives are: (a) to build a new plant, or, if that cannot be justified economically, (b) to withdraw from the manufacturing business in that section of the country.

This holding is, on its face, a paradox; for since a prime objective of Section 7 of the Clayton Act is to prevent substantial lessening of competition, that objective is bound to be frustrated if the effect of Section 7 is to drive manufacturers out of business. It is not surprising, therefore, to find that the current holding in our case runs counter to carefully considered pronouncements of this Court in the leading case of *Brown Shoe Co.* v. *United States,* 370 U.S. 294. Pains were taken there to point out: that in amending Section 7 in 1950, "Congress recognized the stimulation to competition that might flow from particular mergers" (at p. 319); that in merger cases, a "most important such factor to examine is the very nature and purpose of the arrangement" (at p. 329); and that particular mergers should be upheld if "mitigating factors" are present, "*such as* the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position" or "a demonstrated need for combination to enable small companies to enter into more meaningful combination with those dominating the relevant markets" (at p. 346; emphasis supplied).

Abundant and compelling "mitigating factors" were clearly present in the case at bar. Continental was about to be forced out of the business of manufacturing petroleum products for the New Mexico market, because the company's tiny refinery at Artesia had become obsolete and would soon have to be abandoned. Malco's relatively small neighboring plant was likewise in distress: it had lost over half of its most profitable business in the State and was not generating enough earnings to cover essential outlays for plant upkeep. Both of the Artesia refineries had been rendered non-competitive by new pipelines which enable much bigger refineries in West Texas to dominate the New Mexico market, because they could deliver products there at a fraction of the trucking costs Continental and Malco had to bear. Consequently, the Artesia refining operations of both Continental and Malco were threatened with extinction.

The only feasible alternative to an early demise for the two plants was to combine them, modernize them, and connect them by means of pipelines and terminals to market centers — all at a cost of about $6 million. Mr. Anderson was understandably unwilling (if, indeed, he was able) to throw that much good money after the $2.5 million he had already sunk in the Malco refinery. Continental, on the other hand, was both willing and able to take the gamble — and did so, with the result that both Artesia refineries were kept running and made capable of competing on even terms with the big units in the West Texas refinery complex. Competition was thereby perpetuated and enhanced. The precise objective of Section 7 of the Clayton Act was achieved.

In the court below, Judge Payne misapprehended the significance of a passing comment he found in *United States v. Von's Grocery Co.*, 384 U.S. 270, 277, when he stated:

> "Now, in the *Von's Grocery Company* case the Supreme Court said this: 'This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor.'
>
> "In other words, whether or not a merger takes place because one company is about to go under or both about to go under, is immaterial. I think the same would be true in the case before the Court; whether or not Malco was about to go under [or Continental's Artesia refinery] would only last a couple of years, in the light of this *Von's Grocery Company* case would be immaterial. I took all of that into effect in [arriving] at my other decision" (*infra*, p. 3a).

Thus, observance of the legal principal of "mitigating factors" caused Judge Payne to decide — correctly, we say —in favor of Continental in 1965. But rejection of that principal, on the mistaken notion that it had been repealed by *Von's Grocery*, led to his diametrically contrary decision in 1967. This manifest error, we submit, alone calls for reversal of the judgment now here on appeal.

B. Presented here are novel and important questions as to the effect of Continental's unopposed and admittedly bona fide divestiture, prior to trial, of the Malco marketing operation

The Government's main contention in this case is that, by means of the 1959 acquisition from Malco, Continental increased its "share" of the New Mexico retail gasoline market by about 6%.[11] The fact remains, however, that on

[11] The exact amount of such increase is in dispute. According to the stipulated figures, on which Judge Payne relied (*infra*, p. 17a), Malco's share of the New Mexico retail gasoline market in 1958 was 6.2% (1st Stip. of Facts, ¶¶ 1, 10). A higher percentage (6.74%) was shown in GX 69; but on cross examination of the Government witness who prepared that exhibit, his figures were thoroughly discredited (Tr. 307-316, 318-319). Judge Payne refused to make any findings based on these padded figures (*infra*, p. 10a), although requested to do so by the Government (Plaintiff's Amended Proposed Findings Nos. 23-26).

July 1, 1965, Continental relinquished the entire additional "market share" by complete divestiture and surrender of all ownership in, and control over, the Malco marketing operation.

Continental no longer possesses the former Malco "market share"; that part of the original acquisition now belongs to, and is exclusively controlled by, the Copples' wholly independent company. Consequently, the fact that Continental at one time — for a period that expired three years ago — enjoyed the Malco "market share" now has no bearing whatever upon the only question still at issue in this case, namely: whether Continental is entitled to continue to lease and operate the Malco refining facilities at Artesia.

Today, the Copples' company not only owns and controls all of the former Malco marketing assets (including service stations, goodwill, brand names and trademarks), but is also guaranteed a 10-year supply of gasoline from the Artesia refinery or any other product supply source Continental may have in New Mexico. The "Malco" jobbers and distributors therefore now enjoy a far more certain independent source of gasoline supply, through the Copples' company, than was ever available to them before.

The Government has sought to avoid the realities of this situation by arguing that the marketing operation divestiture should be ignored; that "legality under Clayton Act § 7 still must turn on probabilities at the time the acquisition took place, and not what actually transpired under the control of the defendants" (Government's memo of 8/30/67 in support of proposed judgment, p. 4). But that is not the law. It has long been established that the courts will take cognizance of present economic realities. See: *United States* v. *DuPont & Co.*, 353 U.S. 586. Post-acquisition evi-

dence is clearly admissible and should be considered. *F. T. C.* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598. Courts should, and do, give effect at any time to the fact that an issue in litigation has become moot. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 88.

Led into error by the Government's unsound position, Judge Payne refused in 1967 to consider the vitally important effect of Continental's divestiture of the "Malco" marketing operation (*infra*, p. 4a). This clearly erroneous ruling requires, we submit, a plenary review of the case by this Court.

C. It was improper to treat retail sales by other refiners and independent marketers as part of Continental's "share" of the New Mexico retail gasoline market

Continental's complete divestiture of the marketing operation acquired from Malco, including all trademarks and brand names, left Continental with no control of any nature over the retail market share supplied by independent "Malco" jobbers. Continental's only relationship to such independent jobbers, as well as to other refiners reselling under their own brand names, is that of a supplier in bulk of a completely fungible, unbranded product.

This case is thus solely a manufacturing level case. However, the Government has refused to differentiate between the manufacturing level and the retail level of the market and has attributed to Continental all gasoline sold at retail under the Malco trademarks and brands — which Continental no longer owns or controls — and that purchased and resold at retail by other refiners, such as Humble, Gulf, Mobil, Sinclair, *et al*, under their respective brands. *Indeed, the Government did not even attempt to prove what mar-*

ket share Continental and Malco possessed of refinery level sales on the wholesale market. Instead, the Government relied exclusively on purported "shares" of the retail market. To arrive at impressive looking figures, it combined wholesale refinery level sales (including sales to other refiners, such as Humble, Gulf and other majors, and to independent marketers) and retail sales (including gasoline purchased by Continental and Malco from other refiners and resold at the jobber or retail level) and then related these conglomerate figures to total retail sales in New Mexico. The percentages and rankings thus obtained are mathematically unsound and distort proper economic analysis. Sales at the refinery level are simply not mathematically or economically equivalent to sales on the retail market. As this Court recognized in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, combinations at different industry levels of a line of commerce bring into play different considerations.[12] Thus, analysis of a combination at the manufacturing level must differ from that of a combination at the retail level. See 370 U.S. at 328 and 336-339. In spite of the clear lesson of *Brown Shoe,* the Government limited its proof to the

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[12] In one important respect, the case at bar is the converse of *Brown Shoe.* There, "the acquisition of Kinney by Brown resulted in a horizontal combination at both the manufacturing and retailing levels of their businesses." The District Court found that the combination of the *manufacturing* facilities "was economically too insignificant to come within the prohibitions of the Clayton Act." However, it found that the horizontal combination at the retail level did violate the Act. The Government took no appeal from the District Court's findings about the manufacturing facilities, so only questions as to the retail level combination reached this Court. See 370 U.S. at 335.

In our case, on the other hand, the only questions remaining at this time are those pertaining to combined manufacturing facilities. All questions about consolidation of marketing assets have been eliminated and rendered moot by Continental's concededly bona fide divestiture of the whole Malco marketing operation.

retail market and ignored the manufacturing level of the industry.

The District Court's conclusion on remand that this acquisition violated Section 7 was predicated on acceptance of the Government's contentions that the effect of the divestiture of the Malco marketing operation could not be considered, and that Continental, by virtue of the acquisition, controlled almost 17% of the New Mexico retail market (*infra*, p. 4a). This premise — that the competitive effect of this merger can be assessed by simply looking at the New Mexico retail market — constituted the heart of the Government's case. That would perhaps be proper in a horizontal combination of retailing operations. However, this premise can be maintained in the case at bar only by ignoring the economic effect of Continental's complete divestiture of the Malco marketing operation, including the brands and trademarks, and attributing to Malco a share of the retail market based on its refinery level wholesale sales, while ignoring the manufacturing level of the market.[13]

Improper analysis of a manufacturing level case, involving only the supply side of the market, as if it were a simple horizontal retail merger, merits plenary review.

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[13] The Government's position that *U. S.* v. *Von's Grocery Co.*, 384 U.S. 270 and *U. S.* v. *Pabst Brewing Co.*, 384 U. S. 546, support the use of such an analysis is mistaken. *Von's* was a simple horizontal merger at the retail level involving "two large retail grocery companies in Los Angeles." This Court was not concerned with the manufacturing level of the relevant line of commerce. *Pabst* involved the beer industry, where there is extremely high product differentiation by brands. When Pabst acquired the Blatz manufacturing facilities, it necessarily acquired an unrelinquishable control of the Blatz distribution operations, because Blatz wholesalers and retailers could turn to no one else for Blatz beer. By contrast, in our case Continental has divested itself of all the Malco brands. Wholesalers and retailers who had been utilizing Malco brands or other brands can obtain the fungible commodity, gasoline, from any modern refinery or from the new and independent Copple's Company.

D. Continental's acquisition of the Malco refinery had no substantial adverse effect upon competition

Granting that New Mexico alone may be deemed to be the relevant *market* area for purposes of this case, still the boundaries of that State neither logically nor in fact delineate the relevant *supply* area. "Market share" percentages necessarily become of secondary importance in a Section 7 case if the sole asset acquired and retained by the defendant is a manufacturing plant, and the single "line of commerce" involved is a fungible product. In such a case — and this is it — the basic question is; What effect (if any) did the acquisition have upon the *supply* of the product for the particular market? That, in turn, calls for an inquiry as to the alternative sources of supply; and it is thoroughly immaterial whether such other sources happen to be located inside or outside of the "relevant market area."[14]

We have already reviewed the facts of record concerning the numbers, locations and sizes of the refineries furnishing New Mexico with gasoline, and the means by which they deliver that product to market (*supra*, pp. 10-12). In summary, the undisputed proof shows that most of the gasoline consumed in New Mexico comes from outside the State; that the bigger West Texas refineries ship in huge volumes via pipelines; that in 1959 the aggregate refining capacity supplying the New Mexico market exceeded 300,000 barrels per day; that Continental's nearly defunct little plant at Artesia represented only about 1.3% of this total; and that the relatively small Malco plant accounted for but

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[14] Plaintiff's trial counsel frankly admitted: "that the location of refineries are not significant in themselves unless they relate to the competition in the market or the section of the country we are talking about. *That is, we are not confined to refineries in the State of New Mexico*" (Hearing of 7/11/67, Tr. p. 11).

3.8%. In this perspective, the significance (or, rather, insignificance) of the acquisition in controversy is seen to be of *de minimis* proportions.

Moreover, the record is clear that the effect of the acquisition was actually to perpetuate and intensify competition; for otherwise the two doomed refineries at Artesia would have ceased to be competitive sources of gasoline supply for the New Mexico market.

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted.

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. CONTINENTAL OIL COMPANY, Defendant	}	Civil No. 4763

OPINION OF THE DISTRICT COURT
[October 11, 1967]

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[73]

THE COURT: Is there anything that any of you wish to say? Anything further?

MR. SOMERVILLE: Not for the government, Your Honor.

MR. SEARLS: Not for the defendant, Your Honor.

THE COURT: Well, I was in hopes that you would talk a little more about this *Pabst* case to see just exactly what was required.

[74]

Now, in reading the *Pabst* case I found that there were two sections to it and the first section has to do with this matter of what is the relevant area, the geographic market, whatever it is; that I was supposed to consider, and in that, of course, it recites that the Court is to consider any section of the country. Then there is a second part to it, or second section to it, that goes into the question of per-

centages. In the second section, of course, it refers to the *United States versus Von's Grocery Company,* which is found in the same volume. That is 384 US at 276.

Now, I felt that attempting to limit this case to the question of the relevant market area might not be exactly what the Supreme Court had in mind. If I was sure that that's all the Supreme Court would do when they considered this case was decide what the relevant market area was, then I could go on that assumption. But I don't think that assumption would be followed out by the Supreme Court. It isn't what any particular person might think is proper, it's what Congress has said.

In remarking about that, the Supreme Court said: "It passed an amended Section 7 on the premise that mergers do tend to accelerate concentration in an industry. Many believe that this assumption of Congress is wrong and that the disappearance of small businesses with a correlative [75] concentration of business in the hands of a few is bound to occur, whether mergers are prohibited or not. But, it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden, which, in effect, the courts should they now require proof of the Congressional premise that mergers are a major cause of concentration. We hold that a trend toward concentration in an industry, whatever it causes, is a highly relevant factor in deciding how substantial the anti-competitive effect of a merger may be."

In other words, it isn't what I might think or what any individual might think, but it's what Congress has said about the matter that the Supreme Court is trying to carry out here.

Now I don't believe this Court would — or the Supreme Court would review this case without reviewing it in the

light of all the cases they had previously decided, including the *Von's Grocery Company* case. Now that case also was decided after I decided the present case, and in that case, even though the District Court decided that the merger of the companies would not effect [*sic*] competition, the Supreme Court reversed the District Court, anyway, and the District Court made findings of fact and conclusions of law that there was no reasonable probability **[76]** that the merger would substantially lessen competition. Those are not the exact words — or that it wouldn't create a monopoly, and then concluded, therefore, that there was nothing illegal about the merger. And, of course, the Supreme Court reversed the District Court and held that the merger of the two companies was illegal.

Now I realize in this case that it isn't a merger. It's an acquisition. But the same rule would apply.

Now, in the *Von's Grocery Company* case the Supreme Court said this: "This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor."

In other words, whether or not a merger takes place because one company is about to go under or both about to go under, is immaterial. I think the same would be true in the case before the Court; whether or not Malco was about to go under [or Continental Artesia refinery] would only last a couple of years, in the light of this *Von's Grocery Company* case would be immaterial. I took all of that into effect in a writing [*sic* — arriving] at my other decision. But, when I read the *Von's Grocery Company* case when it came out I wondered if I had errored [*sic*] in this case and I might state that I decided it the very best I knew how.

[77]

The Supreme Court sent it back for further consideration. Now, in view of that I considered this case from a new light, from a different light.

Now my figures in the decision were just a little different than the figures in your Jurisdictional Statement. They took their figures from Government's Exhibit Number sixty-nine. I took my figures from a stipulation of facts. But, the difference was not great. My finding was that Malco, for 1958, produced six and four-tenths percent of the gasoline. I want to get it for New Mexico — not the relevant market area, if I can find it here. I think I had it for New Mexico.

Well, I will use the figures in this exhibit since they are not too far different. They are probably just a little larger than what was in my decision. But, in the appendix C here to this Jurisdictional Statement is Table two, which is the total sales of gasoline in New Mexico in 1958, excluding the sales to refineries, and it showed that Continental was fourth in New Mexico with 9.66 percent of the sales; that Malco was seventh with 6.74 percent of the sales. I can't remember the figures I used, but they were just short of seventeen percent, the two of them together.

Now if I read the Supreme Court cases correctly, they hold that that's just inherently bad, [78] regardless of what the government may prove in the way of what happens.

Now in this case I realize that there was a lease of the distributing facilities to Mr. Copple. That was for a ten-year period of time, and I take that to mean that that would change the picture, but as I read the Supreme Court cases they hold that if there's a substantial joinder of companies that have or have had this market area, or this market whatever you might call it, that it is inherently bad and that, therefore, it's in violation of the act of Congress.

Now this case has been before this Court twice. Twice it's gone up to the Supreme Court and twice it has come back. I feel that the Supreme Court felt there was something wrong with my decision or they wouldn't have sent it back, but I feel there was more wrong with it than just the relevant market area, and I believe that the complete consideration of both of the cases would bear that out. And that if it were to go up again, that the Supreme Court — that is, if I were to refuse to change my position, that the Supreme Court would send it back.

Now I don't think that any of my findings of facts about percentages were wrong. I think that in the light of the Supreme Court cases, perhaps my conclusions [79] were wrong rather than my percentages. I felt that under all of the facts that the government shouldn't prevail. But, in view of the two later cases I feel that I must comply with the ruling of the Supreme Court, and our system the Supreme Court is the final arbitrator of these matters and they have the final say and I feel that they have spoken and that it is encumbant [*sic*] upon this Court to fall in line with what the Supreme Court has said.

Accordingly, the Court is going to reverse its previous judgment and find in favor of the United States.

Now I don't know just how we go about handling this. I am sure that — I say I am sure, I presume that Continental will appeal this and the Supreme Court will get to look at it again. It's been up there twice. I don't know why it won't go the third time. But, if the Supreme Court says I am wrong, why, you can bring it back and I will change my position. I am just trying to do what the Supreme Court says for me to do.

MR. SEARLS: If the Court please, the government has proposed a judgment and it is attached to its brief, which

is very objectionable to us. If the Court is going to enter judgment against us, in the first place they prevent us from taking on even a service station in the state of New Mexico for ten years, which [80] is very penal and I don't think it's necessary to carry this out.

THE COURT: Well, I don't know what to do. I am not trying to be mean with you, Mr. Searls, and I am not trying to be contentious. I just want to do whatever the Supreme Court thinks I ought to do and you made a very eloquent address here and it was very forceful, but I was just afraid, and I am afraid, and it's my best judgment that my decision was not in conformity with what the Supreme Court had said since it was made. If it had been considered immediately when I made it, I don't think that I would have been out of line, but in view of the *Von's Grocery* case, particularly, why, I felt that perhaps I had erred and that I was wrong.

MR. SEARLS: At the right time we would like to be heard in opposition to the judgment, which the government proposes, because we think it very penal.

THE COURT: I wonder if you fellows could maybe work out some judgment that you could approve as to form. I don't want you to stipulate yourselves out of an appeal, necessarily, Mr. Searls, but I am not trying to be penal with you because I felt in all seriousness that you were right when I tried this case, and based on the law as I read it at that time I felt that I was right, and, of course, then when the *Von's Grocery Company* case came [81] along, why, I felt like maybe I had erred and so I don't feel that anybody has failed to act in good faith here at all, Mr. Searls.

MR. SEARLS: Yes, sir. Well, we would be glad to try to get with the government on the form of judgment, but we would not want to agree to anything that would be penal

in character that would at any time in the future keep us from acquiring any service stations, even a single service station under the judgment they propose.

THE COURT: I didn't go over it very carefully and haven't gone over it very carefully, but I have read all your briefs. I want you to know that. What I say now wasn't done on the spur of the moment. I have read all the briefs and read and re-read the *Pabst* case and *Von's Grocery* case and thought about them and studied them. I don't know. I didn't want you to think that I was going off half-cocked here in my opinion, but you men see if you can get together on a form and, as I said, I don't want you to stipulate that the judgment be entered but maybe you could approve it as to form only and then reserve your rights to appeal so that you may have the Supreme Court review what I have done here.

MR. SEARLS: Yes, sir.

MR. SOMERVILLE: Very well, Your Honor, we would be happy to discuss it with Mr. Searls.

[82]

THE COURT: Yes. Now we get to the questions of findings of fact and conclusions of law and I don't know what I should do because I think some of my findings in the original case would still be the same now, in other words, as to all those matters as to percentages, and so on. I don't think the facts have changed a bit. It's more a question of conclusion. The only thing that might change is a question of — a matter of fact would be this relevant market area because definitely the *Pabst* case says that we don't take in the whole market area; any area that is relevant. I think you all agree that New Mexico now is the relevant market area, rather than the bigger area that

I had considered to begin with. That being so, that will have to be changed. But as to the sales in New Mexico, why, they haven't changed a bit. It's just a question of whether my conclusions were wrong and I felt that perhaps in view of the Supreme Court cases my conclusions were wrong.

Now the other case drug on a long time from the time I decided it until it reached the Supreme Court, and both of these cases came down in the interim, and whatever is done, this case has been on the docket a long time and I hope counsel on both sides will see if we can't take care of this in a reasonable time. I don't want to crowd you nor to require something that isn't required by **[83]** the rules or anything of that sort, but I just hope that you men will get it up there and let the Supreme Court say what they want to say about it if I am wrong. If I am wrong, why, fine. I will back up and do what the Supreme Court tells me to do, naturally. If I am right, they can say so. But I have just had to decide this the best I could in the light of what the cases were when I decided it, and in light of the cases that have been decided since I first announced my decision. As the Supreme Court says, it isn't what some person, individual person might think is the wise course but it's what Congress has said and they are simply attempting to carry out what Congress has said about the anti-trust laws and I am simply trying to carry out what the Supreme Court has said.

All right. Court will stand in recess.

(Transcript of October 11, 1967 Hearing)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff vs. CONTINENTAL OIL COMPANY, Defendant	Civil No. 4763

DECISION AND OPINION ON REMAND
[November 17, 1967]

PAYNE, D. J.: On May 29, 1967, the Supreme Court of the United States vacated the judgment entered herein on September 20, 1965, and remanded the case to this court "for further consideration in light of *United States* v. *Pabst Brewing Co.*, 384 U.S. 546". Thereafter, defendant, Continental Oil Company, moved for judgment on the record. Plaintiff countered by urging that such motion be denied and that, instead, judgment be entered for the United States. Briefs were filed by both sides; and, following a hearing on October 11, 1967, whereat counsel for the respective parties presented their arguments, this Court announced that, in view of the Supreme Court's remand, this Court was constrained to enter judgment in favor of the United States.

I felt that I could not consider the case mentioned above without considering the cases to which it refers. One of the cases cited was *United States* v. *Von's Grocery Company*, 384 U.S. 270. Reference is made to both of those cases and the cases they cite. I will make no attempt to discuss them here. However, in view of these cases and the state-

ments of the Supreme Court, I took the position that the acts in this case would require my reversal of my previous decision.

To begin with, New Mexico alone should be regarded as a relevant market area for a determination of the effect of what had occurred by the acquisition mentioned in the previous opinion.

Viewed in the light of the aforementioned decision, I find that the acquisition was a violation of Section 7 of the Clayton Act. The acquisition of this refinery increased the share of the market control by Continental even though it may not have intended to violate the law. The mere acquisition of an additional share of the market by a company as large as Continental would, and did, increase its control of the market in the relevant market area. Such control substantially lessened competition in New Mexico.

The opinion of the Supreme Court in the *Pabst* case seems to hold that all of the details and reasons behind the Court's findings need not be set out. It is enough to show that a large company has made an acquisition which would substantially lessen competition in the relevant market area. The Court concludes that this was the effect of the acquisition of the refinery by Continental.

Instead of making any further detailed findings and conclusions, the Court does hereby adopt the findings and conclusions previously made insofar as they are not in conflict herewith and as they are modified by this decision. This decision shall constitute the findings of fact and conclusions of law of the Court, and the requests for findings and conclusions by the parties, insofar as they are inconsistent with this opinion, are hereby denied. The Court does adopt all of the stipulations of the parties as facts in this case, in addition to those which the Court has found.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plainiff vs. CONTINENTAL OIL COMPANY, Defendant	No. 4763 Civil

H. VEARLE PAYNE, JUDGE

DECISION AND OPINION
[September 7, 1965]

In this Decision and Opinion the defendant, Continental Oil Company, will be referred to as "Continental." Malco Products, Inc., a New Mexico corporation, will be referred to as "Malco." The companies which preceded Malco will be called by their names, so that a distinction can be made between them. For clarity, the Court hastens to explain that the present company, named Malco Products, Inc., is a New Mexico corporation. It was preceded by Malco Products, Inc., a Delaware corporation. Hondo Oil and Gas Company was previously a party to this case, and it was preceded by Malco Refineries, Inc.

So that this Opinion will be better understood, it is necessary to give just a little history of the refinery, which is the subject matter of this suit. Prior to May 1, 1959, it was owned and operated by Malco Refineries, Inc., in the manner which will hereinafter be set forth. On said date Malco Refineries, Inc. leased to Continental, for a period

of 20 years, its refinery at Artesia, New Mexico, with an option to Continental to purchase the refinery at the end of 20 years for $100,000.00. On or about August 1, 1959, Malco Refineries, Inc. conveyed its assets, including its interest in the lease purchase contract, to Hondo Oil and Gas Company, a New Mexico corporation. About that time, Malco Products, Inc., a Delaware corporation, was organized as a subsidiary of Continental, and it carried on the marketing operations of the refinery in question, until July 1, 1965, at which time it conveyed substantially all of its assets to Malco Products, Inc., a New Mexico corporation.

The old Malco Products, Inc., a Delaware corporation, has changed its name to Oclam, so that there will be no confusion between the new corporation and the old one.

The parties have stipulated that the transaction by which Continental acquired the refinery was an acquisition within the meaning of Section 7 of the Clayton Act, even though it was a long-term lease with an option to purchase. This transaction occurred on May 1, 1959, and it is this acquisition which is the subject matter of this action.

Suit was filed on May 16, 1961. Thereafter, the defendant filed a motion to add Hondo Oil and Gas Company as a party defendant. On September 18, 1961, the Court entered its order herein granting the motion to add Hondo Oil and Gas Company as a defendant and authorizing the plaintiff to file an amended complaint accordingly. On October 23, 1961, the plaintiff filed its amended complaint. Thereafter, an answer was filed by the defendants.

A stipulation was filed narrowing the issues by excluding crude oil as a line of commerce. This was filed on July 10, 1963. On the same date, there was a first stipulation of facts, a second stipulation of facts and a third

stipulation of facts filed in the case. On July 29, 1963, a fourth stipulation of facts was filed. Immediately thereafter, Continental Oil Company filed a motion for summary judgment. On September 27, 1963, the Court entered its order and judgment herein granting the motion of Continental Oil Company for summary judgment and the amended complaint was dismissed as to both defendants. On November 26, 1963, the United States gave notice of appeal to the Supreme Court of the United States from the order granting Continental's motion for summary judgment. It did not appeal from the order insofar as it dismissed the complaint against Hondo Oil and Gas Company. In due course of time the Supreme Court reversed the decision of the District Court and remanded the case for a trial on the merits, 377 U.S. 161. The Hondo Oil and Gas Company took the position that it was no longer a party to the case since no appeal had been taken by anyone from the order dismissing it from the case. This position was sustained by the trial court. Continental filed a motion to bring the Hondo Oil and Gas Company back into the case but the Court denied the motion and also entered an order striking the name of Hondo Oil and Gas Company from the style of the case. This case thereafter came on for trial on the merits and the Court heard all of the evidence in behalf of the plaintiff and in behalf of the defendant Continental.

LINE OF COMMERCE

The first problem in a case of this type is to determine the line of commerce that is involved. The parties hereto have stipulated that gasoline is the line of commerce and, therefore, there is nothing for the Court to decide in this matter. It is true that a great deal of testimony was presented with regard to the different grades and prices of gasoline and the different manner of handling sales. There

was testimony concerning the companies which sold gasoline under a brand name and those that did not, as well as testimony concerning the prices of gasoline even when sold under a brand name. However, the parties still agreed, and the Court concurs, that gasoline is the line of commerce. In passing, it might be well to comment that the evidence showed that all gasoline was in competition with other gasoline regardless of the price or quality.

RELEVANT MARKET

Section 7 of the Clayton Anti-Trust Act, insofar as it relates to the acquisition of the assets of one corporation by another, refers to a line of commerce "in any section of the country." In other words, the Court must determine what section of the country is involved and this is commonly referred to as the relevant market area. The plaintiff contends that New Mexico is the relevant market area and that Albuquerque is a sub-market. The Court finds that the entire State of New Mexico, El Paso County, Texas and the eastern half of Arizona, extending to and including all of Maricopa County, Arizona, is the relevant market area in this case. That includes, of course, Tucson, Nogales, Flagstaff and other places in eastern Arizona.

Although in the sale and distribution of gasoline it is necessary to consider both the market area and the source of supply, this Opinion will first be concerned with the relevant market area. The Supreme Court in United States v. DuPont and Company, 353 U.S. 586, at page 593, seems to define the relevant market area as the "area of effective competition."

In Brown Shoe Company v. United States, 370 U.S. 294, at page 333, it is stated that in determining the effect of an acquisition the Court must consider such effect on competi-

tion generally in an economically significant market. In United States v. Philadelphia National Bank, 374 U.S. 321, at page 357, the Court said:

> "The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive over-lap, the effect of the merger on competition will be direct and immediate."

It was necessary for the Court to examine the facts to determine the relevant market area in accordance with the law hereinbefore set forth. Both parties agreed that New Mexico was a relevant market area, but the plaintiff contends that it is the entire relevant market area and that Albuquerque is a sub-market. On the other hand, the defendant contends that New Mexico, Arizona and El Paso County, Texas, is the relevant market area. The Court has heretofore defined what it finds to be the relevant market area.

It does not appear to be necessary to discuss New Mexico as a part of the relevant market area since the parties do not dispute this fact. However, the Court will discuss its reasons for including the other areas.

From the evidence, including the maps, it does not appear that the acquired company served Western Arizona. The evidence disclosed that it did serve that portion of Arizona mentioned in the relevant market area, and the sole question remaining is whether or not the sales were substantial enough to amount to effective competition within the meaning of the law heretofore mentioned.

The evidence shows that in 1959, when the acquisition occurred, the company owning the Artesia Refinery was selling gasoline to various people who owned Malco stations in eastern Arizona. Among other things it was shown that

there were 16 such stations in Tucson, 11 in Phoenix, and a number of other stations scattered over the eastern part of Arizona. In 1958 these sales amounted to 13,753,000 gallons in Arizona. The Court heard the various witnesses who operated some of the Arizona service stations or who distributed to other stations in that area. From the entire evidence in the case the Court finds that the portion of Arizona, heretofore described, was a part of the relevant market area and that the gasoline sold there both before and after the acquisition was substantial enough to bring that area within the relevant market area.

During the year 1958 Malco Refineries, Inc. sold 3,850,000 gallons of gasoline in El Paso County, Texas, exclusive of sales of gasoline to other refineries. However, of this amount they purchased 1,988,000 gallons from the Standard Oil Company for resale. That means that they sold in that area 1,862,000 gallons of gasoline not purchased from others and 1,988,000 gallons of gasoline purchased from Standard Oil Company. This was 3.12% of the total sales in El Paso County, Texas.

The Court does not remember whether or not there was testimony concerning service stations in El Paso which used the Malco gasoline in 1959. There is evidence that Malco Refineries sold gasoline from 1956 to 1959 to a Mr. Edmondson, or his family, in El Paso. This may have continued to 1960. Mr. Edmondson died in 1957 and a Mr. McNutt bought the business from his widow in 1960. It was at that time an active business and distributing products under the Malco name. Mr. McNutt, at first, purchased his supplies from El Paso Natural Gas Company, but in 1961 he switched back to Malco. He had 18 stations in El Paso and 14 in New Mexico. It was not shown how many of these he acquired from Edmondson's widow but apparently there was a good deal of gasoline being dis-

tributed in El Paso which came from the refinery of Malco Refineries Company in 1959, when the acquisition occurred, and there has been a good deal sold ever since that time in that area. From that the Court finds that El Paso County, Texas, is one part of the relevant market area. In fact, there is now a pipe line from the refinery at Artesia, New Mexico, to El Paso, and it connects with the line going to Tucson and Phoenix, Arizona. And there is another line connecting El Paso with Albuquerque, New Mexico. This area cannot be ignored in determining the questions before the Court.

The parties have stipulated that the total sales of gasoline by Malco Refineries, Inc., in New Mexico, after excluding sales to other refineries, for 1958 was 23,427,000 gallons or 6.2% of the total sales for the state, and that the total sales of Conoco for the same year, after excluding sales to other refineries, was 36,404,000 or 9.63%. This is a total of 15.83% of sales in New Mexico. It was further stipulated that the sales by Conoco, together with Malco Products, Inc., a Delaware Corporation, in New Mexico, excluding sales to other refineries, for 1961 (after the acquisition) was 39,976,000 gallons or 14.68%, showing that Continental and its subsidiary, after the acquisition, sold less than the two companies did before.

The Court finds, however, that Malco Products, Inc., a Delaware Corporation, was operated by Conoco exactly as it or its predecessor had been operated before the acquisition. It was an active competitor on the market and operated just as it did before so that it did not diminish competition in the least.

The Court further finds that the production of Malco Refinery [*sic*], Inc., for 1958, was 6.4% of the consumption in the relevant market area and the production of Conoco

for that year was 3.2% of the consumption in the relevant market area, for a total of both companies of 9.6%. For 1961 the total of Conoco, with its said subsidiary, was 7.2% of the consumption for the relevant market area. This included the sales to other refineries.

When sales to such other refineries are excluded the production of Malco Refinery [*sic*], Inc. was 4% and Conoco was 2.2% for a total of 6.2% in the relevant market area. By 1961 (after the acquisition) the production of Conoco, with the subsidiary, was 3.6% in the relevant market area.

The parties stipulated to facts which show the number of and the capacity of the refineries in New Mexico. The contention was advanced by the United States that the production of the refineries of Malco and Continental, when combined by the acquisition, would be large enough to reasonably tend to lessen competition in New Mexico. The Court has found that New Mexico, alone, is not the relevant market area. The Court further feels that the production of the two refineries in question, even if combined, is not the ultimate test in determining whether or not competition is lessened. For instance, Arizona, a part of which is the relevant area, has no refinery at all. In other words, the Court has to look to the relevant supply area as well as the relevant market area in determining the effect, if any, on competition of the acquisition. That applies to New Mexico and El Paso County, Texas, as well as Arizona. The Court cannot look to the production alone in New Mexico and shut its eyes to the importation of gasoline from other areas in determining the effect of the acquisition. Neither can the Court fail to consider sales of gasoline by Malco and Continental to other refineries in determining the effect of the acquisition on the consuming public.

In presenting the facts to the Court the parties considered Arizona as a whole and did not attempt to separate the figures so as to show them as they relate to the relevant market area mentioned by the Court. For that reason the findings of the Court will have to refer to the entire State of Arizona, even though the Court has not considered the entire state to be in the relevant market area. However, the large metropolitan areas of Phoenix and Tucson, and in fact the great portion of the population of Arizona is in the relevant market area, and for all practical purposes we may take the figures which have been presented.

From the foregoing facts it is clear that the concentration of supply in New Mexico cannot be gauged by merely considering the refineries in New Mexico, nor in the relevant market area. Southern California, with its mammoth gasoline supply, cannot be ignored as a source of gasoline for Arizona. Neither can west Texas be ignored as a source of supply for the entire relevant market area heretofore defined. In determining whether or not there has been that degree of concentration condemned by the Supreme Court this entire picture must be taken into account.

In addition the Court finds that there is a practice of exchanging gasoline between companies which affects enormous supplies of gasoline. For that reason the refineries in a certain area are not the sole and only consideration. Large companies in other areas exchange gasoline in order to conserve transportation costs. These exchanges make it possible for companies which do not have a refinery in a designated area to exchange gasoline with refineries that do. This works to the advantage of both refineries and saves transportation for each. This cannot be ignored in determining the question of competition. As an example, a company which has a refinery in Texas, which does not have a refinery in southern California, may exchange gas-

oline with some company that does have a refinery in southern California. By this device the refinery in Texas could deliver gasoline in Albuquerque, in exchange for gasoline delivered at Phoenix by the refinery from southern California. The testimony indicated that this system is used widely in the industry. In other words, the source of supply is often enlarged to wide areas by the exchange of products. This enlarges the number of suppliers and minimizes or eliminates concentration or control by a few.

In order to determine the effect on competition it is necessary then to determine what the supply of gasoline may be for the relevant market area. This cannot be determined by the refineries in New Mexico alone but must be determined from a practical standpoint, considering any refineries which may, in the usual course of business, supply the area.

There is a refinery belonging to Shamrock near Dumas, Texas, with a capacity of 25,000 barrels per day; one at Borger, Texas, belonging to Phillips, with a capacity of 71,000 barrels per day, and one at Amarillo, Texas, belonging to Texaco, with a capacity of 19,000 barrels per day. These three refineries are connected to a pipe line which runs westerly into New Mexico, with terminals at Tucumcari and Albuquerque. There is also a pipe line connecting them with Lubbock, Texas, which is close enough to service part of New Mexico.

Albuquerque is likewise connected to El Paso, Texas, with a pipe line. There are two refineries at El Paso, one with a capacity of 53,000 barrels per day and one with a capacity of 16,000 barrels per day.

El Paso is connected with a refinery at Odessa, which has a capacity of 13,000 barrels per day, and a pipe line to Artesia, New Mexico, where Conoco had a refinery with

a capacity of 4,000 barrels per day and where the Malco refinery is situated, which is in controversy here, which had a capacity of 11,500 barrels per day.

El Paso is connected to Tucson and Phoenix by a pipe line known as Southern Pacific Pipe Lines. In turn, Phoenix and Tucson are also connected to a pipe line to southern California, where there are 8 refineries, some of them very large. Likewise, southern California also gets gasoline from the northwestern area.

There are also refineries in west Texas, which supply gasoline into parts or [*sic*] the relevant market area by truck, which are not connected to pipe lines. For instance, Cosden has a refinery at Big Spring, Texas, with a capacity of 30,000 barrels per day. There are also others.

There was no evidence to show that the existing pipe lines were running to capacity. The Court finds that if they were they could easily and cheaply enlarge their capacity to meet greater and further demands on the supply.

From all of the foregoing it is the opinion of the Court that the acquisition in controversy did not substantially diminish competition and that there is no reasonable expectation that it will do so in the future. A careful examination of the map designated as Continental Exhibit 81, with the attending testimony, convinces the Court that competition on the retail level and on the refinery level has not been substantially changed and that there is no reasonable expectation that it will be affected in the future.

The Court heard the witnesses testify concerning the purpose of the acquisition as well as concerning the manner in which the new refinery was used by Continental after the acquisition. From all of the testimony the Court finds that it was the purpose and intent of Continental to operate

the property acquired in the same way it had been previously operated. In other words, Continental did not acquire the property for the purpose of strengthening its position in its standard branded gasolines, nor did it use the property acquired for that purpose. The property was used for a continuation of the practices and policies which had been theretofore followed by Malco Refineries Incorporated.

Furthermore, prior to trial, Continental transferred to a Mr. Copple and his sons the entire stock, ownership, possession and control of the distribution portion of the acquisition. There were no conditions nor ties of any kind so that the distribution portion of the business acquired is no longer under the control of Continental. In that connection, Continental has agreed to furnish the gasoline supply to Malco, now owned by the Copples, for a period of years. This agreement is such that it cannot be cancelled by Continental. Malco is left free to purchase gasoline anywhere it may desire. There is, however, a provision that Continental will furnish only the amount of gasoline purchased in each previous year plus 3%. In other words, if Malco buys its gasoline elsewhere it may diminish or lose the right to purchase from Continental in the succeeding year. This contingency does not seem likely to the Court and it does not take away the independence of Malco in any degree. The amount of gasoline being imported into the relevant market area seems more than adequate to provide a source of supply for any company desiring to purchase.

The Court finds from the evidence that all prices and quality of gasoline is in competition with all other gasoline. None of the witnesses disagreed on this point. In other words, the major companies are in competition with the independent companies and vice versa. It was conceded that gasoline was the line of commerce. There was no issue then to determine whether or not there were various lines of commerce based on the price or quality of gasoline.

It was developed that competition is based on three elements, namely, price, quality and service. In other words, the price of some gasoline may include service as well as quality. On the other hand, some stations cut the price and do not give service or quality. Nevertheless, all gasoline was found to be in competition with all other gasoline and the consuming public makes its choice after considering all phases of this competition.

It was developed that there was a differential in the price of gasoline sold by major companies and independent companies which was more or less constant. When one line of gasoline was sold at a lower price the other line followed so as to maintain this differential. This was not an unqualified rule but it applied in most instances.

The Court now wishes to make its conclusions on the facts heretofore set forth.

The line of commerce was agreed upon. This met the requirements set forth in Brown Shoe Company v. U. S. 370 U.S. 294, at page 326. It was gasoline.

The Court has determined the relevant market area as required in United States v. DuPont & Company, 353 U.S. 586 at page 593. The Court has followed the definition of the relevant market area as defined in United States v. DuPont, supra, Brown Shoe Company v. United States, 370 U.S. 294 at page 335, and United States v. Philadelphia National Bank, 374 U.S. 321 at page 357. The Court concludes that the relevant market area is as heretofore defined and that such meets the requirements of the cases just cited.

The Court concludes that the percentage share of the market of Continental before and after the acquisition was not sufficient to bring it within the presumption of being anti-competitive as set forth in United States v. Aluminum

Company of America, 377 U.S. 271, United States v. Continental Can Company, 378 U.S. 441 or United States v. Philadelphia National Bank, 374 U.S. 321. The Court concludes that this percentage share of the market cannot be determined from the refineries in New Mexico alone. The Court further concludes that the market share of Continental and Malco, combined in the relevant market area did not bring Continental within this anti-competitive category. The Court further concludes that the market share of Continental went down after the acquisition when compared to the total of both companies. The Court further concludes that the distribution of gasoline was continued by a subsidiary company, in competition, just as it had before the acquisition. The Court further concludes that Continental has divested itself of the distribution system which it acquired. The Court further concludes that the United States has not proved any substantial lessening of competition in the past nor any reasonable probability of lessening competition in the future. In fact, the Court concludes that competition has not been affected at all.

The Court concludes that Albuquerque is not a sub-market any more than any town in New Mexico is a sub-market. There was nothing to distinguish it from other towns except its size and the fact that there is a terminal in Albuquerque on the pipe lines. Its problems are no different than Santa Fe, Roswell, Las Cruces or other cities in New Mexico. It is true that each city may be a sub-market in the sense mentioned in the Brown Shoe case, supra, still if that is to be taken as a fact the Court concludes that the effect of the acquisition did not affect Albuquerque any more than any other place in the relevant market area.

In passing, the Court wishes to say that it has considered post acquisition evidence as well as the other evidence

in determining the facts and conclusions in this case. The Court felt this was justified under the ruling in F.T.C. v. Consolidated Foods, 380 U.S. 592.

The Court concludes that the intent of Continental in acquiring the property in question was not to stifle competition. The Court felt that this could be considered as a factor in the case by virtue of the holdings in Brown Shoe Company v. United States, 370 U.S. at page 346, and United States v. Philadelphia National Bank, 374 U.S. at page 371. In that regard the Court concludes that Malco Refineries Incorporated was a marginal operation which was casting about to find a purchaser; that the Continental refinery had a life expectancy of only about two years and that Continental felt that the only practical solution was to combine the two refineries. The Court also concludes that Continental did not acquire the new company for the purpose of increasing its sales or influence as a major company but only to continue the company acquired in the same way it had been conducted in the past.

From all of the foregoing the Court concludes that the United States has failed to prove the material allegations of its complaint and that the complaint should be dismissed.

An order may be prepared and submitted by the Defendant after approval as to form by the Plaintiff.

H. VEARLE PAYNE

United States District Judge

25A

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,
vs.
CONTINENTAL OIL COMPANY,
Defendant.

Civil Action
No. 4763

FINAL JUDGMENT
[February 21, 1968]

Plaintiff, the United States of America, filed its Complaint herein on May 16, 1961; and after trial by this Court, a Final Judgment was entered dismissing the case on September 20, 1965. The Supreme Court of the United States on May 29, 1967 vacated said Final Judgment of September 20, 1965 and ordered reconsideration of this case. Following the submission of memoranda and oral argument; and the Court having entered findings of fact and conclusions of law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto pursuant to Section 15 of the Act of Congress of October 15, 1914 (15 U.S.C. § 25), as amended, commonly known as the Clayton Act. The acquisition of the properties of Malco Refineries, Inc. by defendant Continental Oil Company (Conoco) is in violation of Section 7 of the Clayton Act (15 U.S.C. § 18).

II.

The provisions of this Final Judgment applicable to Conoco shall also apply to each of its directors, officers, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

III.

(A) Conoco is ordered and directed, within twelve (12) months from the date this Judgment becomes final, to divest itself of all of its right, title and interest in the following properties:

(1) The Artesia refinery plant facilities and related assets (including any transferable crude oil import quota allocable or attributable to the refinery facilities); and

(2) The following pipelines connected with said refinery:

(a) *incoming pipelines:* The crude oil system, the LPG system; any natural gas lines used or useable to supply fuel gas; and (b) *outgoing pipelines:* the petroleum products line running from said refinery to El Paso, Texas (excluding Conoco's interest in the products terminals at El Paso, Texas; Albuquerque, New Mexico; and Tucson and Phoenix, Arizona), and the jet fuel pipeline (including delivery facilities) running from said refinery to Walker Air Force Base near Roswell, New Mexico.

(B) Conoco is ordered and directed to publicize the availability of the above properties for sale in appro-

priate trade and/or financial publications and, in general, to promote the expeditious sale thereof. Sale shall be upon terms and to a person approved by this Court and it is the intent of the Court that the purchaser can be expected to operate the refinery and other properties acquired primarily but not exclusively as a supplier of gasoline to independent marketers.

(C) Conoco is ordered and directed to render bi-monthly written reports to the Court, with copies to the plaintiff, detailing its efforts to comply with subsection (A) above, and the results of such efforts, including every offer to buy which it received. Plaintiff or Conoco may apply to this Court for approval or disapproval of any proposal for the sale of said facilities.

(D) Conoco is ordered and directed to furnish to all bona fide prospective purchasers all relevant information regarding said facilities, and to permit them to inspect such facilities, at reasonable hours.

IV.

For a period of ten (10) years from the date of entry of this Final Judgment, Conoco shall not without first obtaining the approval of this Court, acquire directly or indirectly (excluding construction by Conoco), any interest in any of the following businesses or facilities in the State of New Mexico:

(a) any oil refinery;

(b) any wholesale distributor of gasoline, provided this subsection (b) shall not prohibit in each twelve (12) month period any acquisitions of such businesses having combined annual sales of not more than $250,000 or acquisitions of wholesale distributors who have

been selling gasoline exclusively under the trademark "CONOCO" for a period of at least one year prior to their acquisition by Conoco or acquisitions of retail outlets, but this is without prejudice to any claim asserted by the plaintiff in a subsequent antitrust action with respect to the acquisition of retail outlets.

V.

For the purpose of determining and securing compliance with this Final Judgment, and for no other purposes, duly authorized representatives of the Department of Justice shall, on written request of the Assistant Attorney General in charge of the Antitrust Division and on reasonable written notice to Conoco made to its principal offices, be permitted, subject to any legally recognized privilege:

(i) access, during the office hours of Conoco, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Conoco regarding the subject matters contained in this Final Judgment, provided, upon such written request, Conoco shall submit reports in writing in respect to any such matters as may from time to time be requested; and

(ii) subject to the reasonable convenience of Conoco and without restraint or any interference from it, to interview officers or employees of Conoco, who may have counsel present, regarding any such matters.

No information obtained by the means provided in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the

United States, except in the course of a legal proceeding in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VI.

Jurisdiction of this cause is retained by the Court for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, and for the enforcement of compliance therewith and the punishment of violations thereof.

VII.

Defendant Continental Oil Company shall pay such costs as shall be taxed against it by the Court.

ENTERED this 21st day of February, 1968.

/s/ H. VEARLE PAYNE
United States District Judge

APPROVED AS TO FORM:

By /s/ LAWRENCE W. SOMERVILLE
Attorney for the United States

By /s/ DAVID T. SEARLS
Attorney for defendant Continental Oil Company

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No. 206

In the Supreme Court of the United States

OCTOBER TERM, 1968

CONTINENTAL OIL CO., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

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CITATIONS

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International Shoe Co. v. *Federal Trade Commission*, 280 U.S. 291 — 15

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CONTINENTAL OIL CO., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of the district court (J.S. 9a–10a) holding that the acquisition by appellant of an independent oil refining company violated Section 7 of the Clayton Act, and directing divestiture.

In May 1959, Continental Oil Company ("Continental") acquired most of the assets and business of Malco Refineries, Inc. ("Malco"), including Malco's sole petroleum refinery, located in Artesia, New Mexico (GX–

49, pp. 1–2, 4–5, 8; GX–50). On May 16, 1961, the United States filed a complaint alleging that the acquisition violated Section 7 of the Clayton Act because its effect might be to lessen competition substantially or tend to create a monopoly in the sale of gasoline in New Mexico. The district court granted Continental's motion for summary judgment in September 1963, but on May 4, 1964, this Court summarily reversed and remanded the case for trial on the merits. *United States* v. *Continental Oil Co.*, 377 U.S. 161. On September 20, 1965, after trial, the district court entered a judgment dismissing the government's complaint, holding, *inter alia,* that New Mexico was not a proper geographic market in which to test the effects of the acquisition (J.S. 14a, 26a). On May 29, 1957, this Court vacated the judgment and remanded the case "for further consideration in light of *United States* v. *Pabst Brewing Co.*, 384 U.S. 546." *United States* v. *Continental Oil Co.*, 387 U.S. 424. On remand, appellant having conceded that New Mexico is a relevant geographic market (J.S. 5), the district court held that the acquisition substantially lessened competition in the marketing of gasoline in that State and therefore violated Section 7 of the Clayton Act (J.S. 1a–10a, 13a–14a).

A. THE MERGING COMPANIES

Continental is a major fully-integrated oil company engaged in the business of gathering and refining crude oil and marketing gasoline under its "Conoco" brand in 35 States. Prior to the acquisition, Continen-

tal was the eighth largest producer of domestic crude oil, the twelfth largest oil company in terms of net assets (approximately $788 million) and sales (approximately $597 million) and the fourteenth largest domestic refiner. It maintained a network of 700 jobbers and distributors and 8,150 service stations located throughout the Rocky Mountains, the north-central, southwestern and southeastern States (3d Stip.).

Continental owned one refinery in New Mexico, which had a daily capacity of 4,000 barrels of oil (1st Stip.). Continental supplied 11.76 percent of all gasoline sold in New Mexico and was the fifth largest seller there (GX 68a; Table 1, *infra,* p. 19; 1st Stip. ¶¶ 1, 10, 11, and 12). If sales to other refiners are excluded, Continental accounted for about 10 percent of all New Mexico sales and was the fourth largest seller there (GX 69; Table 2, *infra,* p. 19; 1st Stip. ¶¶ 1, 10, 11. and 12).[1]

Prior to the acquisition, Malco was a local, not fully integrated, independent oil company which owned one refinery (3d Stip., ¶¶ 10–11). That refinery had a daily capacity of 11,500 barrels and was located in Artesia, adjacent to Continental's New Mexico refinery. Gasoline from the Malco refinery was distributed by approximately 60 jobbers and distributors and 175 retailers in New Mexico, eastern Arizona, and El Paso County, Texas (1st Stip., ¶¶ 17–18). Malco's gasoline was sold at retail under the brands "Malco," "Nu-Mex" and "Valley" as well as

[1] See notes 4, 7, *infra.*

on a rebranded basis,[2] at prices lower than those charged for major-branded gasoline such as "Conoco" (Tr. 915–916, 1263). Malco supplied 12.61 percent of all gasoline sold in New Mexico and was the third largest seller in New Mexico (GX 68a; Table 1, *infra*, p. 19; 1st Stip., ¶¶ 1, 10, 11, 12). Excluding sales to other refiners, Malco accounted for 6.74 percent of all New Mexico sales and was the seventh largest seller there (GX 69; Table 2, *infra*, p. 19; 1st Stip., ¶¶ 1, 10, 11, 12).[3]

B. CONCENTRATION IN THE NEW MEXICO MARKET

Each company that supplies more than 5 percent of the gasoline sold in New Mexico has refining facilities located either in New Mexico or on a pipeline serving New Mexico. It is difficult to sell gasoline in New Mexico from refineries less advantageously located because the cost of transporting oil is far greater by truck than by pipe. (Tr. 1575, cf. Tr. 795, 1492.)

The largest firm in the New Mexico gasoline market accounts for 17.09 percent of total gasoline sales, the four largest firms account for 54.89 percent of all sales, and the eight largest firms (the smallest of which sells only 3.06 percent of the total) account for 86.69 percent of all sales (GX 68a; Table 1, *infra*, p. 19). If inter-refiner sales are excluded from total

[2] "Rebranded" gasoline is gasoline sold to independent distributors who sell it under their own brand names.

[3] Some refiners, such as Malco, sold substantial amounts of gasoline to other refiners for distribution through the other refiners' marketing systems.

sales, the largest firm accounts for 17.15 percent of all gasoline sales, the four largest firms for 48.38 percent, and the eight largest for 76.30 percent of all sales (GX 69; GX 174; Table 2, *infra,* p. 19).

In terms of New Mexico sales, Continental's acquisition of Malco combined the third largest seller with 12.61 percent of the market (Malco) and the fifth largest seller with 11.76 percent of the market (Continental). Continental thus became the largest seller, with 24.37 percent of the market. The total market share of the four largest firms was increased from 54.89 percent to 66.65 percent (GX 68a, Table 1, *infra,* p. 19). If sales to other refiners are excluded, the acquisition combined Continental, the fourth largest seller with about 9.6 percent of the market, and Malco, the seventh largest seller with about 6.7 percent of the market, and established Continental as the second largest seller with more than 16 percent of the market. The total market share of the four largest sellers was increased from 48.38 percent to 54.58 percent (GX 69; GX 174; Table 2, *infra,* p. 19).[4]

[4] There are very minor discrepancies between the stipulated market share figures (1st Stip., ¶1) and other market-share figures introduced by the government (see GX 68a). The latter have been used throughout this motion to affirm because they are more complete. The district court recognized that the differences were so slight as to have no substantial effect on the relevant market shares, or the increase in Continental's market control (J.S. 4a, 8a, 10a, 17a).

C. THE ECONOMIC SIGNIFICANCE OF THE INDEPENDENT REFINERS

Of the 378 million gallons of gasoline sold in New Mexico in 1958, 250 million were sold by major, integrated oil companies while 128 million, or 35 percent, were supplied by independent refiners (1st Stip., ¶ 1, p. 1; GX 68a). The government's expert witness, Dr. DeChazeau, testified that major oil companies tend to concentrate upon competition in terms of quality and service rather than price (Tr. 426–427, 469). He stated that because each major company believes that any price-cut would be followed by its competitors and would lead to a fall in total revenue, the major companies try to avoid price competition and their retail prices tend to be rigid (Tr. 426–427); and because they wish to protect their brand names, major refiners ordinarily will not sell gasoline to independent distributors who supply retailers selling gasoline at discount under brand names not nationally advertised (Tr. 438–439).[5]

He further testified that independent refiners tend to rely on price as their principal competitive weapon, for they cannot afford to pay for the advertising neces-

[5] Four major oil companies sold significant amounts of their own gasoline in New Mexico: Texaco, Continental, Phillips and Standard of Texas (Sotex). Texaco, Continental and Phillips did not, prior to the acquisition of Malco, sell any substantial quantity of gasoline to independent marketers in New Mexico. 1st Stip., ¶ 2d (Texaco), ¶ 12; Tr. 591 (Continental), GX 77a (Phillips). The record is less complete as to Sotex, but it establishes at least a prima facie case that Sotex followed a policy similar to that of Phillips, and the record contains no evidence that Sotex sold significant amounts of gasoline to independent marketers. See GX 148a; Tr. 438, 1490–1491, 1546, 1550, 1610; but see Tr. 1149, 1328.

sary to create a demand for their brand; and that they generally sell at prices below those charged by the major-brand refiners. Dr. DeChazeau concluded that the "tendency towards non-price competition * * * has been held in check * * * by the existence of a fringe of independents who * * * [can] cut price[s] and, therefore, tend to hold price levels down." (Tr. 443.)

Dr. DeChazeau's conclusions were disputed to a limited extent by Dr. Boatwright, an expert witness for Continental. Dr. Boatwright testified that he did not believe that any clear line divided oil companies into majors, spurning price competition, and independents, competing in price. While the court did not specifically resolve this disagreement, it seemed to accept Dr. DeChazeau's views, stating (J.S. 23a):

> * * * [T]he price of some gasoline may include service as well as quality. On the other hand, some stations cut the price and do not give service or quality. * * * It was developed that there was a differential in the price of gasoline sold by major companies and independent companies * * *.

Prior to the acquisition, Continental, like other major companies, refused to sell gasoline to rebranding retailers (Tr. 1453), preferring to sell under its own brand name (Tr. 1275–1276) or, if necessary, to other major brand firms. If a surplus appeared likely, Continental, like other major oil companies, commonly followed the practice of either adjusting its output or exchanging gasoline with other major companies,

rather than allowing its gasoline to be sold under independent brand names. (Tr. 438, 614–615).

Malco, on the other hand, concentrated on the sale of its product without reference to brands (Tr. 428). Malco's jobbers and distributors were allowed to sell to whomever they pleased and to determine their resale prices (Tr. 881, 915; GX 20). Prior to the merger, Malco was the third largest independent refiner serving New Mexico and supplied 19.3 percent of the gasoline sold by independent jobbers, distributors and retailers in New Mexico (GX 69, Table 4, *infra*, p. 20). El Paso Natural Gas Products Co., which has since been acquired by a major oil company, Shell (Tr. 266, 433, 948, 1785), supplied another 27.6 percent, and Shamrock Oil & Gas Co. supplied 19.5 percent of all independent gasoline. The remaining eleven independent refiners furnished only one-third of the independent gasoline sold in New Mexico (GX 69; Table 4, *infra*, p. 20).

ARGUMENT

1. The framers of the 1950 amendments to section 7 of the Clayton Act expressed particular concern with "oligopoly," the condition in which most of the business in a market is controlled by a few firms (S. Rep. 1775, 81st Cong., 2d Sess., p. 5). Theory and experience both teach that when a market becomes highly concentrated or oligopolistic in structure, the intensity and effectiveness of competition—and price competition in particular—are likely to diminish. In such a market each of the major sellers has such a significant share that a price cut by one cannot be ignored by the others, but must immediately be matched.

Price cutting therefore does not pay, and tends to be avoided; "parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 280.

In order to carry out the congressional purpose of protecting competition by preventing such economic concentration, this Court, in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, held that a merger is presumptively illegal under Section 7 when it (1) produces a firm that has "an undue percentage share of the relevant market" and (2) "results in a significant increase in the concentration of firms in that market" (374 U.S. at 363). The acquisition involved in *Philadelphia National Bank* produced a firm controlling 30 percent of the relevant market. In *United States* v. *Pabst Brewing Co., supra, this Court held that an* acquisition resulting in control of 24 percent of the Wisconsin market, 11.3 percent of a three-state market and 4.5 percent of national sales, when viewed against a background of a trend toward industry concentration, established a violation of section 7 in each and all of those areas. Similarly, the acquisition in *United States* v. *Von's Grocery Co.,* 384 U.S. 270, which produced a firm whose sales accounted for 7.5 percent of the Los Angeles retail grocery market, was declared unlawful. In the present case the increase in Continental's market share and the correlative increase in concentration among suppliers of gasoline to New Mexico invalidate the merger under the tests established by those cases.

The merger significantly increased concentration among New Mexico suppliers.[6] It united the third and fifth largest sellers, made Continental the largest seller with 24.37 percent of the market, and increased concentration among the first four firms from 54.89 percent to 66.65 percent (GX 68(a); table 1, *infra*, p. 19). If inter-refinery sales are excluded, this acquisition still is well within the tests of *Von's*, *Pabst* and *Philadelphia National Bank*.[7] It joined the fourth and seventh firms, raised Continental's position from fourth with 9.66 percent of the market to second with more than 16 percent and increased concentration among the first four firms from 47.73 percent to 54.58 percent (GX 69; GX 174; Table 2, *infra*, p. 19).

Contrary to appellant's contention (J.S. 21–23), it was proper to measure the effects of this merger in terms of market shares. If anything, for reasons discussed below, pp. 12–15, the market shares understate the gravity of the anticompetitive effects. The potential injury to consumers from increased concentration at the refining level is not diminished by the fact that some refiners (such as Continental) are integrated into distribution and others (such as Malco) sell to independent distributors. The structure of the

[6] Sales figures for firms selling in New Mexico are provided in Tables 1 and 2 (Appendix, *infra*, p. 19).

[7] Although we believe that market figures including such inter-refiner sales are appropriate to determine the concentration produced at the refinery level by this acquisition, the illegality of the acquisition is apparent even when such sales are excluded. The volume of Malco's sales to other refiners does not, however, bear directly upon Malco's special importance as a supplier of independent marketers (see pp. 12–15, *infra*).

industry at the refining level will affect the pricing decisions of refiners, and, therefore, ultimately of distributors, regardless of whether some firms are integrated into distribution as well.

Nor do concentration figures based on sales overstate the importance of Continental and Malco in the New Mexico market. It is true that because some of the other firms selling in New Mexico have large refining capacities located on New Mexico pipelines, they could increase their New Mexico sales by diverting gasoline from other markets. However, most of the capacity not now being used to produce gasoline for sales in New Mexico is being used to produce gasoline for sales in other markets (See Tr. 466–467, 1676),[8] and both the government's expert and defendant's expert testified that capacity used to produce gasoline sold in other markets could not be treated as capacity available to serve New Mexico (Tr. 466–467, 1676). Insofar as refining capacity is used to produce gasoline committed to other markets, considering such capacity in measuring concentration would overstate the amount of gasoline likely to enter the New Mexico market. Moreover, all of the refining capacity in New Mexico or on New Mexico pipelines is owned by firms already selling significant amounts of gasoline in that State. Those firms have little, if any, incentive to try, through price competition (or by other means that may induce price competition), to introduce more gasoline into New Mexico if each of them

[8] Less than 20 percent of total capacity is unused (CON X 161).

can, instead, benefit from an oligopolistic price structure.

2. The anticompetitive effects of this acquisition are even more substantial than is indicated by the impressive concentration figures, because of the elimination of Malco as an independent supplier of gasoline to independent jobbers and distributors in the New Mexico market. As we have pointed out (see pp. 6–7, *supra*), the record indicates that the major oil companies compete more in terms of advertising and services than in price. Independent gasoline companies, on the other hand, concentrate on price competition. The independent companies are therefore an important factor in keeping gasoline prices low, for their presence in a market limits the power of the major companies to set higher than competitive prices.

The elimination of Malco as an independent refiner is likely to restrict the supply of gasoline available to independent distributors in New Mexico. In 1958 six firms sold significant amounts of gasoline to independent distributors in that State. Three of them (El Paso, Shamrock, and Malco) accounted for 66.4 percent of all such sales. El Paso accounted for 27.6 percent, Shamrock for about 19.5 percent and Malco for 19.3 percent (see Table 4, *infra*, p. 20). Moreover, prior to the acquisition, only six independent refineries were able economically to supply significant amounts of gasoline to New Mexico.[9] Of those six companies,

[9] Only five independent firms selling significant amounts of gasoline in New Mexico owned refineries located in New Mexico or on New Mexico pipelines. A sixth independent firm, Cosden, shipped gasoline to New Mexico by truck.

three accounted for 91.0 percent of the total independent refining capacity. Shamrock accounted for 38.2 percent, El Paso for 35.2 percent, and Malco for 17.6 percent (see Table 5, *infra*, p. 20). Thus, by acquiring Malco and eliminating it as an independent supplier of gasoline to independent distributors, Continental has eliminated an independent source accounting for nearly 20 percent of all sales to independent distributors and more than 17 percent of the independent capacity that might economically be used to supply independent distributors.

The anticompetitive effect of the merger is further increased because El Paso, an independent refiner even larger than Malco, has been acquired by Shell, a major oil company (Tr. 433). The cumulative effect of these two mergers is to reduce from six to four the number of independent refiners selling more than insubstantial amounts of gasoline in New Mexico, and to eliminate 52.8 percent of the independent refining capacity that had been available in 1958 (see Table 5, *infra*, p. 20). Unless the major companies significantly increase their sales to independent distributors—and the record indicates that this is improbable (see *supra*, p. 6)—Continental's acquisition of Malco is likely either to make it more difficult for independent refiners to buy all the gasoline they require, or to increase significantly the price they have to pay for it. Cf. *United States* v. *Aluminum of America*, *supra*, 377 U.S. at 280–281. Indeed, the record shows that, both before and after the acquisition, some independent distributors experienced dif-

ficulty in obtaining adequate supplies of gasoline (Tr. 1117–1118, 1120, 1550, 1878–1879).

Contrary to appellant's suggestion (J.S. 19–21), the anticompetitive effects of the acquisition were not cured by the fact that Continental, just before the trial began, divested itself of certain marketing properties,[10] created an independent distributing organization to service independent dealers formerly supplied by Malco (J.S. 22a, 24a), and agreed to supply that organization with a limited supply of gasoline for a limited period of time (Tr. 10–12; Con X 154). Not only is there no basis in law for appellant's assumption that such devices could ever be used to immunize from judicial relief an acquisition that otherwise violated Section 7, but it is clear on this record that Continental's supply agreement is not an adequate competitive substitute for Malco's presence as an independent refiner. First, Continental is obliged to supply gasoline to the independent company only for ten years; there is no assurance that, at the end of that time, Continental's historic reluctance to supply independents will not reassert itself. Second, during the life of the supply agreement Continental is required to furnish the independent company in any year only 3 percent more gasoline than the company bought from Continental in the prior year (CON X

[10] The acquired marketing assets divested by Continental on the opening day of trial constituted only 1.8 percent of the value of the acquisition, and consisted of five service stations, office equipment, trucks, signs, marketing equipment, and the right to use the name "Malco" (CON X 64, 152–155; GX 49, 50, 161).

154, p. 2). Thus, if demand falls in one year, the marketing company may be seriously restricted in the amount it can buy from Continental in succeeding years. Moreover, the marketing company is in some measure restrained from shifting purchases from Continental temporarily, lest its assured source of supply be reduced *pro tanto* for future years.

3. This Court has stated that, in exceptional circumstances where certain mitigating factors exist, an otherwise illegal acquisition may be permitted. Such factors have been stated to be "business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position [or] a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 346. The record refutes appellant's argument that there are present here any such "mitigating factors" which justify the acquisition. It is therefore immaterial that the district court apparently misinterpreted this Court's opinion in *United States* v. *Von's Grocery Co., supra,* as rejecting *Brown Shoe*'s recognition that particular acquisitions can be justified by such "mitigating factors" (see J.S. 3a).

Malco was plainly not a "failing company." See *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291.[11] The company was on a sound financial

[11] Congress, in amending the Clayton Act, approved this Court's holding in *International Shoe* that to fall within the failing company exception, a company "not * * * actually in a state of bankruptcy" must be "heading in that direction with the probability that bankruptcy will ensue." S. Rep. No. 1775,

basis, and had operated profitably throughout its existence (1st Stip. ¶ 20; Tr. 817, 845, 867–870; 989; GX–20). Although its profits had declined in the two years preceding the acquisition, other major oil companies operating in the New Mexico market, including Continental, had a similar experience. After the acquisition in 1959, Malco's earnings increased steadily since 1960 (GX–20; GX–182). Malco never sold gasoline at distress prices (Tr. 1004). Its decrease in gasoline sales did not result from an inability to market its product (Tr. 1005).

Malco's owner testified that the company was prepared to continue to compete if the properties had not been sold (Tr. 772, 776–778). Construction of a new alkalization unit at the refinery was completed in 1958, prior to the acquisition, at a cost of $1,500,000 (Tr. 765). As late as April 1959, a month before the acquisition, Malco contracted to buy four service stations to experiment with the possibility of operating its own retail outlets (Tr. 776–778).

Nor can Continental properly claim that it was a small company which needed the acquisition in order to compete more meaningfully with dominant firms. Continental was a major, integrated oil company that had been in the New Mexico market for more than fifty years; its Conoco brand gasoline had a strong market position and good public acceptance. It had a substantial investment in marketing properties in the

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81st Cong., 2d Sess., p. 7 (1950); H. Rep. No. 1191, 81st Cong., 1st Sess., p. 6 (1949); 96 Cong. Rec. 16435 (remarks of Senator O'Conor); 96 Cong. Rec. 16444 (remarks of Senator Thye).

State and extensive crude oil holdings adjacent to the refinery. New Mexico had been a profitable marketing area for Continental, and it had a large market share. The opportunity for future growth and return on investments was considered good. (GX–31–32, 36, 37, 38.) Continental had the advantage of a crude oil supply near the Artesia refinery and was expecting substantially increased oil production. It was advantageous for Continental to utilize as much of its New Mexico crude oil as possible in refining operations in that State, since a tax penalty would be incurred if the crude oil were shipped outside of the State. Continental had a favorable location in Artesia to supply products to other major oil companies (GX–12, p. 3; GX–42).

Understandably, then, Continental was not considering withdrawal from the New Mexico market (GX–4, 6, 14; Tr. 634–635). Although the company's Artesia refinery was nearing obsolescence, with an estimated life expectancy of two or three years, it had several alternatives to the acquisition of the Malco properties. These included obtaining supplies through exchange or processing agreements, or purchases, from other refineries; modernization and upgrading of the Artesia refinery; and construction of a new refinery at another location (see GX–4, 6, 11, 39, 42). Continental's management, after weighing these alternatives, chose the Malco acquisition not as a matter of economic necessity, but because it was the most attractive business proposition at the lowest cost (Tr. 583–584).

On this record, appellant has failed to show any "mitigating factor," within the meaning of *Brown Shoe, supra,* which might serve to avoid the normal applicability of the Clayton Act to a merger with this demonstrated anticompetitive impact on the New Mexico market.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1968.

APPENDIX

STATISTICAL DATA

TABLE 1.—*Total Sales of Gasoline in New Mexico (1958) (including net inter-refiner sales*)*

Rank	Refining Company	Gallons	Percentage of Total Sales
1	Sotex	64, 694, 933	17. 09
2	El Paso	48, 735, 298	12. 88
3	Malco	47, 717, 766	12. 61
4	Texaco	46, 603, 977	12. 31
5	Continental	44, 513, 774	11. 76
6	Phillips	36, 551, 961	9. 66
7	Shamrock	27, 689, 352	7. 32
**8	Cosden	11, 592, 317	3. 06
9	Famariss	10, 382, 409	2. 74
10	Gulf	6, 099, 185	1. 61
	Others	33, 914, 353	8. 96

*Net inter-refiner sales are sales to other refiners less purchases from other refiners.

**Cosden is an independent refinery located in Texas off the New Mexico pipeline. It ships gasoline to eastern New Mexico by truck. (See p. 6, *supra*.)

Source: GX 68(a).

TABLE 2.—*Total Sales of Gasoline in New Mexico (1958) (excluding inter-refiner sales)*

Rank	Refining Company	Gallons	Percentage of Total Sales
1	Sotex	64, 906, 784	17. 15
2	Phillips	41, 214, 497	10. 89
3	Texaco	40, 419, 761	10. 68
4	Continental	36, 566, 756	9. 66
5	El Paso	36, 447, 546	9. 63
6	Shamrock	25, 737, 706	6. 80
7	Malco	25, 519, 719	6. 74
†8	Gulf	17, 976, 430	4. 75
†9	Magnolia	17, 573, 990	4. 64
10	Cosden	11, 592, 317	3. 06
†11	Humble	11, 162, 631	2. 95
†12	Sinclair	9, 705, 283	2. 56
13	Famariss	8, 535, 762	2. 26
14	Four States Western	5, 667, 417	1. 50
	Others	25, 468, 726	6. 73

†These companies have no refining facilities in New Mexico or on New Mexico pipelines, but they buy most of the gasoline which they sell in New Mexico from one or more of the other companies listed above.

Source: GX 69.

TABLE 3.—*Refineries Located in New Mexico or on New Mexico Pipelines Ranked According to Refining Capacity*

Rank	Refining Company	Capacity (barrels per day)	Percentage Share of Total Capacity
1	Phillips	71,000	31.1
2	Sotex	53,000	23.2
3	Texaco	35,000	15.3
4	Shamrock	25,000	10.9
5	El Paso	23,000	10.1
6	Malco	11,500	5.0
7	Continental	4,000	1.8
8	Wickett	2,500	1.1
9	Four States	2,000	0.9
10	Famariss	1,380	0.6

Source: Con X 81.

TABLE 4.—*Sales in New Mexico by Independent Refiners Located in New Mexico or on New Mexico Pipelines (1968)*

Rank	Refining Company	Gallons	Percentage of Sales
1	El Paso	36,447,546	27.6
2	Shamrock	25,737,706	19.5
3	Malco	25,519,719	19.3
4	Cosden	11,592,317	8.8
5	Famariss	8,535,762	6.5
6	Four States Western	5,667,417	4.3
*	Others	18,500,000	14.0

*None of the other independent refiners accounts for more than 4% of all sales by independent refineries.

Source: GX 69.

TABLE 5.—*Refining Capacity of Independent Refiners Located in New Mexico or on New Mexico Pipelines*

Rank	Refining Company	Capacity (barrels per day)	Percentage Share of Total Capacity
1	Shamrock	25,000	38.2
2	El Paso	23,000	35.2
3	Malco	11,500	17.6
4	Wickett	2,500	3.8
5	Four States	2,000	3.1
6	Famariss	1,380	2.1

Source: Con X 81.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

CONTINENTAL OIL CO. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

No. 206. Decided October 21, 1968.

PER CURIAM.

Being convinced on the record before us that Malco Refineries, Inc., was not a "failing company," *United States* v. *Third National Bank*, 390 U. S. 171, 183 (1968); *International Shoe Co.* v. *FTC*, 280 U. S. 291 (1930), and that the record otherwise supports the decree, *United States* v. *Pabst Brewing Co.*, 384 U. S. 546 (1966), we affirm the judgment of the District Court.

MR. JUSTICE HARLAN, believing that this case involves issues of fact and law which should not be decided without plenary consideration, would note probable jurisdiction and set the case for argument.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.